In the

United States Court of Appeals

For the Ninth Circuit

CYRIL MELVIN BERG, *Appellant*,

v.

JOHN R. CRANOR, Superintendent of Washington State Penitentiary, at Walla Walla, Washington, *Appellee.*

No. 14061

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE.

BRIEF OF APPELLEE

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ADDITIONAL STATEMENT OF THE CASE

The appellant was charged by information in the superior court of the State of Washington for Chelan County with the crime of carnal knowledge of a female child, not his wife, under the age of eighteen, to-wit, age seventeen. He was subsequently tried

by the prosecuting attorney, Mr. James Arneil, before the Honorable Fred Kemp, Judge. The trial resulted in a hung jury. Then the prosecutor-elect having taken office, another trial was instituted which resulted on March 3, 1949, in conviction. The defense, a form of alibi, that is, petitioner's mind "went blank" during the pertinent period, was not believed by the jury. Following motions and argument on March 10, 1949, to vacate the judgment and for a new trial, the judgment and sentence was signed on March 17, 1951, by Judge Kemp. Immediately petitioner's new attorney, Mr. J. Edmund Quigley, gave oral notice of appeal which was noted in the clerk's records. The time within which petitioner had to file a statement of facts then began to run. Mr. Quigley later, and from Seattle, Wash., mailed a written notice of appeal which was received and filed March 21, 1949. Note here that it is not and was not contended the oral notice was for any reason invalid. Thus, the written notice had to be mere surplusage. In the correspondence between Mr. Quigley and Judge Kemp, Quigley requested Judge Kemp to "serve the prosecutor" with this useless document. The judge mislaid this document (the notice of appeal) on his desk and the result was that the written notice of appeal was never served on the prosecutor. The prosecuting attorney then, at the appropriate time, moved to dismiss the appeal in the Supreme Court of the State of Washington. Briefs and oral argument were heard and decision deferred until after the argument on the merits

which also included argument on the timeliness of filing. The appeal was dismissed. *State v. Berg*, 35 Wn. (2d) 177, 211 P. (2d) 710 (1949). Petitioner has had some three petitions for habeas corpus in the Supreme Court of the State of Washington and the present one heard in the district court and presently being appealed to this court.

The petitions are similar in every respect with only minor variations. The appellant in a calumnious petition is urging that Mr. J. A. Adams, trial counsel, was completely incompetent and actively conspired with the judge and with the prosecutor to secure petitioner's conviction. All this, despite the fact that Mr. Adams is a long respected member of the Washington State Bar Association, a former partner to the Honorable Sam Driver of the United States Federal District Court, and the present superior court judge of the State of Washington for Chelan County. Appellant has sought to prove his allegations of conspiracy by further alleging in his petition that Mr. Adams didn't try the case as petitioner would have tried it and has set out in great detail the methods and procedure that he, petitioner, would have used had he been trying the case himself.

The petitioner has also directly accused Judge Kemp and the prosecutor not only with joining in a conspiracy with Mr. Adams, but that the P. A. also knowingly used perjured witnesses at the second trial, which resulted in petitioner's conviction. In

support of these charges, the petitioner offered not one scintilla of factual proof in the district court.

The petitioner also alleges a denial of due process in that the State of Washington denied him the right to appeal. This, because the Supreme Court of the State of Washington dismissed the appeal upon motion of the prosecuting attorney because the statement of facts had not been filed within the ninety days allowed by the rules of our court.

APPELLEE'S STATEMENT OF QUESTIONS INVOLVED

There are two questions raised by appellant's petition: (1) Did J. A. Adams, Judge Kemp and Robert Conner, the prosecuting attorney, conspire together to gain appellant's conviction in the trial court? (2) Was appellant denied the right to appeal?

ARGUMENT

This matter has been fully examined by our supreme court in Cause No. 30975, *State v. Berg*, *supra*, both on the merits and on the motion to dismiss the appeal. Subsequently, it has been heard in three or four applications for writs of habeas corpus. In each of these actions the appellant's contentions have been found wanting and the petitions have been denied.

To begin with, oral notice of appeal was given on March 17, 1949. On this point there is absolutely

no argument. Rule 12(1)(a) entitled "Appeals in Criminal Cases" found in 18 Wn. (2d) 14-A, reads in part as follows:

> "In criminal causes, in order to initiate an appeal, notice of appeal to the supreme court shall be given in open court at the time, or written notice of appeal shall be served upon the prevailing party and filed in the office of the clerk of the superior court within five days after the entry, of judgment or order from which the appeal is taken."

The time when the petitioner had to file his statement of facts began to run at the time of giving the oral notice of appeal. Later, Mr. Quigley mailed a written notice of appeal which was received and filed March 21, 1949. In his letter sent along with the notice was a request that Judge Kemp serve a copy on the prosecuting attorney. Again it is to be noted that at no time has there ever been a contention that the oral notice was for any reason invalid, rather the contention being, that the written notice was valid and therefore should be given effect although it was not served on the prosecuting attorney. The fact that the attorney for petitioner attempted to make Judge Kemp an errand boy, and failed, is used as a basis for the petitioner's allegation that he was discriminatorily denied the right to appeal. It might be assumed that this could be carried to an extreme and that oral notice of appeal could be given at the time of the signing of the judgment and sentence and then a written notice of appeal given on the thirtieth day and properly filed and served upon the respondent.

Would this, then, invalidate the oral notice of appeal or, as a matter of fact, are there two appeals granted in this state? Obviously, they are alternatives and if an election is made, then it is certainly to be assumed that the person making the election must stand upon it. In the instant case, counsel for petitioner at the time elected to give an oral notice of appeal. He cannot subsequently change his mind and give a written notice of appeal. Any such contention is sheer nonsense. Further, there is no authority, no duty nor any statute setting up a requirement that a judge, when requested by counsel, must act as an errand boy or server of papers for attorneys who appear before him. Further, the diligence of the petitioner's second attorney is further disclosed by the fact that on the ninetieth day, after oral notice of appeal (the 86th day after the written notice) he filed his praecipe with the Chelan County clerk demanding a transcript be prepared. This was done within two days but, of course, was too late.

During the proceedings had in the district court, from which this appeal is being prosecuted, Mr. Conner, the prosecuting attorney of Chelan County, and the man who prosecuted petitioner, upon cross-examination was asked if he had been served by Judge Kemp with the written notice of appeal. Mr. Conner emphatically denied that the papers were ever served on him. (Tr. 70-71.) To illustrate the position the petitioner is taking with regard to the service of the papers upon the prosecuting attorney the following

took place in the federal district court before Judge Driver:

> "THE PETITIONER: Your Honor, if I may make a comment?
>
> "THE COURT: Surely, go ahead.
>
> "THE PETITIONER: Am I to be held responsible and sent to prison for such acts as the trial judge mislaying a paper, without an appeal? (Tr. 73.)
>
> "BY THE PETITIONER:
>
> "Q. Now, Mr. Conner, I wish to ask you one more question about this after I read this, and I want you to tell me and explain to this Court and these people in this courtroom whether the judge is lying or is he telling the truth.
>
> "THE COURT: Beg your pardon, what was that question?
>
> "THE PETITIONER: I want Mr. Conner to tell the Court whether the Honorable Judge Kemp was lying or whether he was telling the truth." (Tr. 74.)

The petitioner is insisting that the trial judge, when requested or told to do so, by counsel, must serve papers on a party to the contest. There is no suggestion of authority to sustain this proposition and that basically constitutes petitioner's case of denial of the right to appeal. The word of J. A. Adams, Judge Kemp, and Robert Conner, prosecuting attorney, as against the word of the petitioner is in issue. It is respectfully submitted that this man, a convicted criminal, is the first to question the honor, integrity and ability of the people named.

In the brief of appellant, he has stated the question as if this were an appeal from the dismissal by the Supreme Court of the State of Washington of his attempted appeal in 1949, in *Berg v. Cranor, supra.* Because of statements made by petitioner and because the opinion is short, it is set out herein *in toto.* It reads as follows:

> "PER CURIAM.—[1] Appellant gave notice of appeal in open court on March 17, 1949, but the certified transcript of the record was not filed with either the supreme or the superior court until ninety-two days later; and, by the terms of Supreme Court Rule 12(3), no appeal in a criminal case is effectual unless such transcript is filed within ninety days after giving notice of appeal. *State v. Hampson*, 9 Wn. (2d) 278, 114 P. (2d) 992.
>
> "Appellant also prepared a written notice of appeal, and it was filed on March 21, 1949, within five days after the entry of the judgment appealed from, but it was not served upon the prosecuting attorney. Rule 12(1)(a) provides that where a written notice of appeal is given in a criminal case it shall be served upon the prevailing party within five days after the entry of the judgment appealed from. Rule 12(3) provides that, if a notice of appeal is not given in the manner and within the time specified by Rule 12(1)(a), the appeal is not effectual.
>
> "The appeal is dismissed."

The rules set out in the opinion have been stated by our courts in many decisions to be jurisdictional. In other words, a failure to comply with these rules divests the court of jurisdiction to hear and decide a given case. It is also worthy of note, that assuming the written notice was a good notice, it was not served

upon the prosecuting attorney, which in itself is fatal. In fact, giving petitioner the benefit of the doubt, he failed to perfect either of his appeals.

During the course of the proceedings had in the district court, the appellant referred to *State of Washington v. Archie Brown*, 26 Wn. (2d) 857, 176 P. (2d) 293 (Tr. 86). In that case the prosecuting attorney, on October 13, 1945, filed an information against Archie Brown, Aaron Johnson and Willie Smith charging them with the crime of murder in the first degree in Count 1 and with the crime of robbery in Count 2. The defendants were Negroes. Trial of the three resulted in a verdict of guilty of first degree murder and the death penalty was recommended against the defendants, Archie Brown and Aaron Johnson. It was not recommended against Willie Smith. Judgment and sentence was entered and filed with the clerk of the superior court of Franklin County on November 29, 1945. Written notices of appeal were filed in behalf of the defendants Brown and Johnson on October 29, 1945. At the time judgment and sentence was imposed upon the defendants, the court entered an order directing that the statement of facts and briefs on appeal be paid for out of public funds. The appeals were docketed in the office of the clerk of the supreme court on January 4, 1946. A $5.00 appearance fee was required to accompany the notice of appeal by the terms of Rule 12, then existing in the supreme court. These appearance fees were finally paid by the respective attorneys out of their own pockets on March 1, 1946, and March 4,

1946, respectively. Notice that the date of expiration of the ninety day period in which the appellants under Rule 12 were permitted to perfect their appeal, was February 27, 1946. Because of the jurisdictional requirement of the payment of the $5.00 filing fee the clerk of the supreme court under Par. 7 of Rule 12 governing this procedure placed the case on the court's docket for automatic dismissal because of lack of jurisdiction resulting from failure of appellants' counsel to perfect their appeals within ninety days after the filing of notices of appeal. No notice is required to be given to any party when the cases on the dismissal docket are set by the clerk. The appeals were accordingly dismissed on March 22, 1946. The matter then came back to the court on a petition for a vacation of the order of dismissal of the appeals. Beginning at page 861 the court set out the following:

> "Rule 12, paragraph (3), Rules of Supreme Court, 18 Wn. (2d) 14-a, (presently embodied in Rule 46, Washington Reports, 2nd Series, 34A) which governs the procedure on appeal in criminal cases, provides:
>
> " '(3) Strict conformance with the following requirements shall be necessary, and no appeal to the supreme court in a criminal cause shall be effectual unless:
>
> " 'First, notice of appeal shall have been given in the manner and at the time specified in (1) (a) of this rule;
>
> " 'Second, within ninety days after giving notice of appeal, appellant shall cause to be filed in the office of the clerk of the supreme court or of the clerk of the superior court:

" '(a) The statement of facts or bill of exceptions, when it is necessary for a decision of the case on appeal, showing service on respondent and certified by the judge of the superior court: *Provided*, That the time for certification may be extended by the chief justice of the supreme court or, in his absence, by any judge of that court upon written application made within said ninety-day period and upon a showing that the necessity for additional time for the certification is not due to any lack of diligence on appellant's part. If an extension be granted, the judge so granting it shall fix the time within which the statement of facts or bill of exceptions shall be certified and the time within which appellant's opening brief shall be served and filed;

" '(b) Transcript of record certified by the clerk of the superior court;

" '(c) Appellant's opening brief, prepared in accordance with the rules of the supreme court, with proof of service thereof on respondent, unless the time for service and filing be extended as provided in (3) (a) of this rule.

" 'Third, within ninety days after giving notice of appeal, the appellant shall deposit with the clerk of the supreme court five dollars as that clerk's docket fee, if the appeal is taken by a defendant.'

"Paragraph (7) of Rule 12 provides:

" '(7) If, upon the expiration of said ninety days after giving notice of appeal, the record is not made or fee not paid, all as required by this rule, the clerk of the supreme court shall forthwith, and without the necessity of any notice to appellant or his attorney of record, note the cause upon the calendar of the supreme court for the next motion day as being a cause subject to dismissal, and the supreme court shall dismiss the cause.' "

As pointed out by the court, these rules are jurisdictional and must be observed to the letter or the court does not acquire jurisdiction. While these rules are made by the court itself, it is to be observed that they operate equally on each and every individual coming before the court on appeal. However, in the instant case, *State v. Brown*, the court said at page 866,

> "To summarize our views, as expressed herein, and in an endeavor to clarify those views for members of the bar, we wish to state that the sole reason for suspending the strict requirements of our Rule 12 in the instant case is that the appellants were sentenced to forfeit their lives in punishment for their crimes. We are of the opinion that capital cases should not be embraced within the rigid requirements of the rule. This idea is suggested by our Rule 28(2) which provides as follows:
>
> " 'Service upon an attorney shall be made by delivering to him personally, or at his office by delivery to his clerk or to the person having charge thereof; or, if his office be not open, or there be no one in charge thereof, at his residence by delivery to some person of suitable age and discretion residing therein; or, if neither of the foregoing methods can be followed, by deposit in the post office to his address, with postage prepaid. *In capital causes, a motion to dismiss an appeal shall be served upon the defendant personally, as well as upon the attorney of record.*' (Italics ours.)
>
> "We wish to be clearly understood as holding that the rule announced and the language used herein are applicable only to cases in which the death penalty has been imposed.
>
> "[3] We likewise hold that that section of Rule 12 which requires the payment of a five-dollar filing fee to the clerk of this court within

ninety days following the filing of notice of appeal, and further providing that the jurisdiction of this court to hear the appeal is conditioned upon the payment of such filing fee, has no application to cases appealed *in forma pauperis*. As applied to all other criminal appeals, Rule 12 stands, and no qualification or relaxation of its rigid requirements will be countenanced in cases other than capital cases and cases appealed *in forma pauperis*.

"The order of this court, entered March 22, 1946, dismissing the appellants' appeals, is vacated. The clerk of this court is directed to reinstate their appeals, and the appellants are ordered to serve and file their opening briefs with the clerk of this court within thirty days following the filing of this opinion."

There was a vigorous dissent in this case by Chief Justice Millard, concurred in by Judge Simpson. Judge Millard sets out the cases in which the very strict jurisdictional rule of our court has been many times decided. Some of these in the dissenting opinion and beginning at page 869, read as follows:

"In *State v. Conners*, 12 Wn. (2d) 128, 120 P. (2d) 1002, defendant appealed from conviction of crime of grand larceny. Every step in perfecting the appeal was timely and strictly conformed to the rules of this court except payment of required appearance fee of five dollars. Under the rules, the fee should have been paid on or before the sixtieth day after giving notice of appeal. As the clerk of this court did not receive the filing fee until the sixty-second day after notice of appeal was given, we dismissed the appeal. See, also, *State v. Nelson*, 6 Wn. (2d) 190, 107 P. (2d) 1113.

"In *State v. Hampson*, 9 Wn. (2d) 278, 114 P. (2d) 992, defendant was convicted of

the crime of murder in the first degree and sentenced to the penitentiary for life. Appellant was thirteen days late in filing an abstract of the record. On that ground, we dismissed his appeal.

"In *State v. Domanski*, 9 Wn. (2d) 519, 115 P. (2d) 729, defendant was convicted of being an habitual criminal and sentenced to life imprisonment. We held that his failure to follow the rule of this court requiring the setting out of instructions in the opening brief could not be excused. Although he filed on the day of the argument in this court a document setting out the challenged instructions, we refused to consider them.

"In *State v. Schafer*, 154 Wash. 322, 282 Pac. 55, appellant was found guilty of murder in the first degree and the death penalty exacted. We refused to relax the rule which then required filing of bill of exceptions or statement of facts within ninety-day period.

"In *State v. Hall*, 185 Wash. 685, 56 P. (2d) 715, defendant appealed from conviction of murder and death sentence. We held that appellant had not substantially complied with the rule that errors assigned but not argued in the brief would not be considered.

"In *State v. White*, 40 Wash. 428, 82 Pac. 743, defendant appealed from conviction of crime of murder in the first degree. Appellant was unable to secure within the time required by the rules a transcript by reason of his poverty. We dismissed the appeal and held that such right could be forfeited by reason of his poverty. See, also, *State v. Harder*, 130 Wash. 367, 227 Pac. 501."

The respondent has seen fit to set out this case and the cases cited therein for the reason that while the petitioner originally was not attacking the su-

preme court, in the appeal he has departed somewhat from his original contentions and based his attack upon the system of appeals in Washington. It is submitted that the arguments and authorities in the *Brown* case do not dispense with jurisdictional requirements but relaxes them only in the case of a crime in which capital punishment is to be imposed. As a matter of fact, one of the relaxed jurisdictional requirements set out in the *Brown* case has been formulated into a rule. In Washington Reports, Second Series, 34A, Rule 46, Appeals in Criminal Cases, subsection 6 at page 51, appears the following:

> "Within ninety (90) days after the giving of notice of appeal, the appellant, if defendant (except in appeals prosecuted *in forma pauperis*), shall deposit with the clerk of the supreme court five dollars as that clerk's docket fee."

CONCLUSION

The right to appeal is embodied in our constitution and in our law. However, this right is personal to an accused and he is put to his burden to take advantage of his right as prescribed by the rules of our court. This is clearly discernible from the cases cited herein. If he does not take advantage of the opportunity given him according to the rules as they are clearly laid down, particularly when he has been represented by adequate counsel, in this case Mr. J. Edmund Quigley, then he has no cause to complain that he has been discriminatorily denied the right to appeal. Respondent freely admits that a discriminatory denial of the right to appeal would be good grounds for the issuance of a writ of habeas corpus. *Dowd v. Cook*, 340 U. S. 206. However, in that case the warden of the penitentiary, a state official of Indiana, actually and physically prevented the petitioner therein from sending his papers out of the prison so that at no time could he fulfill the requirements as required by the rules of court. Certainly, no such situation presented itself in the instant case. Petitioner had every opportunity, aided and abetted by counsel, to perfect his appeal. Counsel failed to do this. Surely petitioner cannot now be heard to complain.

Respectfully submitted,

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